

PHED COMMITTEE #2  
March 12, 2007

MEMORANDUM

March 8, 2007

TO: Planning, Housing, and Economic Development (PHED) Committee

FROM: Marlene Michaelson, Senior Legislative Analyst *MM*  
Jeff Zyontz, Legislative Attorney *JZ*  
Amanda Mihill, Legislative Analyst *AM*  
Shondell Foster, Research Associate *SF*

SUBJECT: Report of the Ad Hoc Agricultural Policy Working Group

This is the PHED Committee's first meeting to discuss the Report of the Ad Hoc Agricultural Policy Working Group. The Introduction and Summary of Recommendations are attached on © 10 to 19. (The full report has been distributed to the Council and is available on-line or from Council Staff.) On January 30, the Council was briefed by the Group. The Planning Board was also briefed, and held a public hearing on February 22 and worksessions on March 1 and March 8. Staff has attempted to summarize the Planning Board's recommendations in this memorandum; the written recommendations of the Planning Board will be circulated as soon as they are available. Attached on © 1 to 5 is a chart summarizing each action needed to implement the Group's recommendations with a potential time frame and assignment of responsibilities for drafting recommended changes in law or regulation. This is followed by a chart listing the same tasks organized by time frame for action (see © 6 to 9).

Staff recommends that the discussion today focus on whether the Committee supports the **general** recommendations of the Working Group and wish to direct the relevant agency staffs to begin preparing the necessary documents to implement the policies recommended in the Report. Since each recommendation will require follow-up action in the form of legislation, zoning text amendments, regulations, or amendments to the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan, there will be future opportunities to focus on the details. For example, if the Committee endorses the creation of a Building Lot Termination (BLT) program, the Council will have the opportunity to consider program details at the time the Executive regulations and funding proposals are before the Council.

In summary, Staff supports all of the major recommendations in the Report and believes that the Council should direct the relevant agencies to begin drafting the amendments to law and regulation needed to implement those recommendations.

This memorandum provides a summary of the Group recommendations, followed by Staff comments.

## I. TRANSFERABLE DEVELOPMENT RIGHTS

### Group Recommendations

The Group believes that the Transferable Development Right (TDR) program requires significant attention and adjustments if it is to fulfill its important role in the Agricultural Reserve. The Report included the following recommendations:

- *Distinguish between excess and buildable TDRs.<sup>1</sup>*
- *Require TDR utilization for residential development in floating zone applications/local map amendments.*
- *Designate buildable TDRs for use in floating zones as well as in commercial and industrial zones, central business district and research and development zones with an equivalency to floor area ratio or square footage for their use.*
- *Clarify limitations on non-agricultural, non-residential uses (such as private institutional facilities) where land is covered by a TDR easement.*
- *Reintroduce legislation to prevent property owners from selling all TDR easements and subsequently developing a non-residential, non-agricultural use on the property.*

The Group also endorsed the following recommendations of the 2002 TDR Task Force:

- *Master plans should more aggressively seek to maximize the number of receiving areas.*
- *If additional density is considered via rezoning not recommended in the Master Plan, the use of TDRs should be part of the change.*
- *The County should work with local municipalities to establish inter-jurisdictional TDRs to create receiving areas in municipalities.*
- *Eliminate the requirement in single-family zones and subdivision regulations that receiving areas use 2/3 of the possible TDRs.*

The Group received briefings from the County Planning Department on the status of a system to track the use of TDRs and was satisfied that improved TDR tracking is under way and that the planned TDR tracking system should meet future TDR information needs.

---

<sup>1</sup> The Working Group referred to that single TDR retained for each 25 acres that can allow a house to be built on the lot as a "buildable TDR," and the other four TDRs for each 25 acres as "excess TDRs," since the landowner cannot use the excess TDRs to build on RDT-zoned property in "sending areas," but can only sell them to be used in "receiving areas."

## **TDR Deficit**

When the Working Group was briefed on the TDR program on July 10, 2006, it was presented with the same information presented to the Council when the Council reviewed the Shady Grove Sector Plan in the summer of 2005. Planning Staff indicated at that time that they believed they could locate receiving areas in upcoming master plans to balance the estimated gap of 800 to 1,300 TDRs, particularly since the Council had begun to place TDRs on the residential portions of mixed-use zones. After the Group concluded its work on the Report, Planning Staff provided an updated estimate of needed additional receiving areas at 3,100 to 3,600 TDRs. This is a significant increase and one that Staff believes cannot be accommodated if future TDR receiving areas are limited to the existing residential zones. In the 25 years the program has been in existence, the Council has created a total of 10,000 TDR receiving areas. This was accomplished for the most part by placing TDRs on undeveloped land with significant potential for development. Future receiving areas are more likely to be placed in areas where redevelopment is expected. Staff does not believe there is a near term likelihood of an additional 3,000 to 4,000 residential units in currently developed areas, all of which would be appropriate for TDRs.)

## **Staff Comments**

The TDR deficit highlights the need to aggressively pursue all opportunities to expand receiving areas and ensure that **appropriate** increases in density are achieved via TDRs. Staff agrees with the Working Group's many suggestions for new opportunities for receiving areas in floating zones, commercial and industrial zones, and mixed-use zones (including the commercial portion). Given the deficit of receiving areas for the existing TDR program for "excess" TDRs, Staff questions whether it will be possible to create enough receiving areas to purchase the balance of excess TDRs and also purchase "buildable" TDRs as well. It is very likely commercial and industrial receiving areas will be needed to balance the existing program for excess TDRs. Staff does not believe the County should create a TDR program for buildable TDRs until it has determined how to locate enough receiving areas for the existing program.

The Planning Department has been working to update all TDR tracking and should be prepared to report to the Council in the next few months. Staff recommends that the Committee schedule a briefing and discussion for this summer to receive a complete report on the updated numbers. The Committee should also ask the Department to present a strategy for identifying receiving areas to ensure the existing program will be in balance, estimate the number of additional receiving areas needed to serve a buildable TDR program, and indicate whether they believe they can identify a sufficient number of receiving areas to serve both programs. Staff also recommends that the Council ask the Department to add to its workprogram the refinements of the TDR program suggested by the TDR Task Force and the Working Group. Staff believes that this work should be well underway before the Council considers the Twinbrook Sector Plan later this year so that changes to the program can be applied where appropriate in Twinbrook (e.g., require TDRs for any proposed increases in commercial or industrial density).

## II. CHILD LOTS

### Group Recommendations

The Group recommends continuing to allow building lots for the children of property owners who have owned the land since 1980 in the RDT zone. They believe that the child lot provision is an important means to preserve and promote agriculture by allowing children to farm with their parents on the family farm. They recommend the Council amend the Zoning Ordinance to clarify the density provisions for child lots, ensure ownership by the child, and protect farmland.

They recommend the maximum density of subdivisions with child lots be one lot per child *in addition* to the base density allowed in the RDT zone.<sup>2</sup> To limit the use of child lots for improper purposes, they recommended the following limitations on child lots:

- *A child must own the child lot dwelling for five years; however exceptions should be allowed for hardship cases such as those used in the Maryland Agricultural Land Preservation Foundation (MALPF) easement program.*
- *A child must not lease the child lot dwelling or enter into a contract for sale for five years, except the child may lease the child lot home to an immediate family member.*
- *A landowner may create only one child lot for each child regardless of the number of properties owned.*
- *A child lot may be created after the death of the landowner if the landowner's intent was to create the lot and is established in writing through a will or other document admissible in probate.*
- *A majority of the land on parcels with child lots must be reserved for agriculture.*

*To facilitate the implementation of the ownership requirement and leasing prohibition, we recommend additional written documentation and recordation at different steps in the planning process. We also recommend substantial monetary penalties for violation of child lot requirements.*

*We recommend limiting circumstances in which public water can be provided to child lots to the following:*

- *When the child lot can be served from an existing, abutting water main and will not allow service to others.*
- *When public water service can be provided in a manner that would not prevent the future application for a State or County easement to preserve agriculture.*

*We recommend the County Council be required to approve any request for public water to a child lot in the RDT zone rather than allowing administrative approval.*

---

<sup>2</sup> Note that there were minority comments on pages A-7 of the report and point of clarification on page A-15.

## Staff Comments:

For the past few years there have been different interpretations of the original intent of the Preservation of Agriculture and Rural Open Space Functional Master Plan and the Zoning Ordinance with regard to child lots. In fact, there is no reference to child lots in the body of the Master Plan and both the Master Plan Appendix that summarizes the Rural Density Transfer (RDT) zone and the adopted RDT zone include ambiguous language regarding child lots. Staff strongly supports the Group's recommendation to clarify the Zoning Ordinance.

If Staff were to create a new program today, Staff would most likely not recommend that child lots be allowed in addition to market lots. However, this is a program with a 25 year history and one can neither pretend that past practices are irrelevant, nor ignore the realistic impact of further limitations at this time. Due to the 25 year practice, the limited number of likely additional child lots, and the ownership requirements recommended in the Report, **Staff strongly supports the Group's recommendations on this subject as submitted.**

As explained in greater detail in background information presented to the Working Group, Planning Department publications (including "Plowing New Ground") and Planning Department Staff memoranda have interpreted the Plan and Zoning Ordinance to allow child lots in addition to market lots. Until recently, the Planning Board accepted this interpretation.

Specifically, the Board has constantly interpreted and applied the language in Division 59-C-9 as permitting child lots to be created in addition to the base zone density of one unit per twenty-five acres. An original tract owner (who meets the eligibility requirements) may create a lot for each child or the spouse of a child plus "market" lots up to the base density, provided the total number of lots do not exceed the number of TDRs (one per five acres) available for the original tract.<sup>3</sup>

This interpretation was not the judgment of a single planner or Board, but was interpreted consistently by Planning Department staff, Department of Economic Development staff, and the Planning Board for approximately 20 years. During this period property owners relied on this interpretation to establish property values and secure loans. It has only been in recent years that there has been the suggestion that the Planning Board was inappropriately interpreting the Master Plan.

There are approximately 100 properties remaining that could create child lots. Historically each property has created an average of two child lots per property when there were no restrictions on resale and a child could resell the lot before ever occupying the home. Fifty-five percent of properties created only one child lot. While the average given past practices would yield approximately 200 additional child lots, Staff believes that the Group's various recommendations to ensure ownership by the child (and penalize those who do not adhere to these requirements) will significantly reduce the number of potential child lots. For example, if one assumes that only 25% of children will choose to continue living on their parents' property, the likely number of child lots will be approximately 50. Staff does not believe it is worthwhile to change the

---

<sup>3</sup> Planning Staff memo, Ganassa property, February 16, 2006, page 5

M-NCPPC practices for the past 25 years to prevent what is likely to be a relatively small number of homes from being built in the Agricultural Reserve.

Staff notes that the situation that has rightly concerned some individuals and groups has been the small subdivisions created using the child lot provisions. There can be little doubt that multiple houses built simultaneously were not created for children of farmers to occupy, but to be resold. Staff believes that the new ownership requirements will prevent this. Since it is unlikely that multiple children will be prepared to build and occupy homes at the exact same time, child lots built in the future will most likely be built one at a time and more in character with the area than a small subdivision with multiple similar homes.

The one problematic situation that the Committee may want to consider further is the rare case where there are multiple children on a small property. If the Council is concerned about this, it can be addressed with targeted solutions rather than by broadly limiting or eliminating child lots for all owners.

The Planning Board recommends that child lots be limited to the density already allowed for market units and that restrictions also be placed on ownership. The combined impact would be that no one would choose to create a child lot since the disadvantages of the ownership requirements would far outweigh the questionable remaining advantage of a child lot (being exempt from the area and dimensional requirements of the RDT zone). The Planning Board received, but rejected, suggestions to increase the ownership requirement suggested in the Report from 5 to 10 years. Staff believes that appropriate length of required ownership can be debated when the Council reviews the zoning text amendment and subdivision regulation amendment that would implement the Group's recommendations to ensure ownership.

The Planning Board also believes that a child lot should not be created after the death of an owner, even with the requirements stipulated by the Group. The Group suggested this provision to assist a family in the rare case of an accidental death. At the Transportation and Environment (T&E) Committee's request, the Group also considered whether public water should be extended to child lots. The Master Plan currently prohibits it, while the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan allows it. The Planning Board did not concur with the Group's recommendation to allow public water in limited circumstances. Both recommendations provide relief for property owners in very limited circumstance and will not significantly impact the number of child lots. (The Working Group recommends tracking the number of child lots that receive public water to monitor whether the number exceeds the very limited number of properties expected to take advantage of this option.) Neither of these recommendations are critical components of the overall recommendations given their limited impact.

### **III. SAND MOUNDS**

#### **Group Recommendations**

The Group did not reach a unanimous recommendation regarding the use of sand mounds. A majority of the Group recommends allowing sand mounds as follows: one sand mound per 25

acres for the first 75 acres. Beyond that, one sand mound should be allowed for every 50 acres of land in the parcel. (For example, a property owner with 125 acres but less than 175 acres would be allowed four sand mounds; one with 175 acres but less than 225 acres would be allowed five sand mounds, etc.) A minority of the Group would allow one sand mound per 50 acres.

In addition, the Group unanimously recommends sand mounds be allowed under the circumstances listed below, for a parcel existing as of December 1, 2006.

- *Where there is an existing house and the sand mound would not result in the development of an additional house.*
- *When it enables a property owner with approved deep trench system percs to better locate potential houses to preserve agriculture.*
- *For child lots, provided that our recommendations related to child lots are also adopted (e.g., ownership requirement). Sand Mounds will be approved for child lots where they are approved under the zoning provision or approved under the Agricultural Easement Program MALPF/AEP.*
- *For bona fide tenant housing, provided that recommendations related to tenant houses are also adopted. Sand Mounds will be approved for bona fide tenant housing wherein the dwelling can never be conveyed from the parent parcel.*
- *For any pre-existing parcel that is defined as an exempted lot or parcel in the zoning regulations.*
- *For properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions (specific criteria for these grandfathering provisions are addressed below).*
- *For any permitted agricultural use under the zoning regulations (e.g., farm market).*
- *For the purpose of qualifying for a State or County easement program (including a Building Lot Termination program).*

### **Staff Comments**

The use of Sand Mounds was the most difficult issue the Working Group addressed. It spent several meetings discussing alternatives and trying reach consensus and ultimately ended up with a virtual tie vote on two proposals. The proposals have greater similarities than differences. Both the majority and minority agreed to certain exempt properties that would be able to use sand mounds (e.g., those will failing septic systems). Both the majority and minority agreed that sand mounds should neither be disallowed, nor allowed without restriction. The proposals differ in the magnitude of the limitation. The majority proposal would result in an approximately 22% reduction in the likely number of sand mounds (estimated to be 557 with no restrictions on use), while the minority proposal would result in an approximate 46% reduction in the likely number of sand mounds.

The Planning Board did not support the majority or minority recommendations to allow, but limit, the number of sand mounds. The majority of the Planning Board believes no sand mounds should be allowed in the Agricultural Reserve other than those allowed for the exempt properties and those that can be shown to directly support agriculture. Commissioner Bryant supported the

majority recommendation in the Report. The Board did support most of the exemptions but did not support the exemption that would allow a sand mound for the purposes of qualifying for the Building Lot Termination (BLT) program. Given the fact that the County is unlikely to identify funding to purchase all available lots under the BLT Program, Staff agrees that it would not be appropriate to use scarce dollars to terminate a lot that is not otherwise buildable. The Planning Board also suggested that sand mounds be allowed to replace a lot that can perc due to the environmental benefits of sand mound versus deep trench technology.

Staff concurs with the overall approach taken by the Working Group to limit, but not eliminate, sand mounds and believes that the exact magnitude of the reduction can be debated when the Council has before it legislation and amendments to the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan. Staff believes these amendments could be drafted to reflect either the majority or minority recommendations in the report and that they should be the starting point for further discussion; other alternatives can be considered during the legislative review process.

Questions have been raised as to whether County limitations on sand mounds would pre-empt state law. Council Staff have had discussions with the Deputy Director of the Water Management Administration in the Maryland Department of the Environment who indicated that it has never been the Department's intent to prevent a local jurisdiction from limiting the use of sand mounds and they would not object to any future limitations. Staff believes it would be useful to have this in writing.

#### **IV. BUILDING LOT TERMINATION (BLT) EASEMENT PROGRAM**

##### **Group Recommendations**

The Group recommends establishing a BLT easement program as a way to prevent fragmentation of farmland in the Agricultural Reserve. A BLT program is designed to compensate a landowner financially in exchange for an easement that eliminates future development of a lot shown to be viable for building through a soil percolation test. The Group has identified eligibility criteria for participation in the BLT program to ensure that a bona fide development lot is terminated and appropriate public benefit is derived, which are detailed in the report.

As a basis for compensation, the Group recommends a landowner prove that the lot can support a house with a viable septic system before participating in the BLT program. Regarding funding, the Group recommends public funding of the BLT program initially using proceeds from the Agricultural Transfer Tax with compensation set at a percentage of the fair market value of a buildable lot in the RDT zone. At the same time, the Group recommends the County create a buildable TDR program to provide private funding via the purchase of TDRs by developers of non-residential property.



## **Staff Comments**

Staff believes that the BLT program, if implemented properly, can be the single most successful tool to reduce building potential in the Agricultural Reserve, while at the same time providing a source of equity for existing property owners, some of whom have farmed in the Agricultural Reserve for multiple generations. Many farmers view this equity as critical to the ongoing operation of their farms.

It would not be economically feasible, nor has it been suggested, that every buildable lot be terminated and therefore it will be important for this program to target properties most valuable to the Agricultural Reserve. When the Executive Regulations are before the Council, significant attention should be given to how the program will select among applications.

The primary issue that will require further attention is the cost of this program and funding options. The Agricultural Transfer Tax can provide one source of funding and at the current time the Department of Economic Development estimates there is \$5.5 million available for the BLT program. Based on current estimates of lot costs, this funding would only allow the purchase of approximately 14 lots. Funding availability will clearly limit the size of the program, but its advocates argue that the preservation of even a few lots justify the creation of this program. Staff recommends that the Council ask the Executive to prepare the Executive Regulations and an assessment of program costs and potential funding options.

The Working Group recommends that the BLT program be funded by both public funding and private funding via an expanded TDR program for commercial properties. While Staff is supportive of private funding, Staff believes that it will be necessary to create commercial and industrial receiving areas to balance the existing TDR program and that it may not be possible to create enough receiving areas to serve the existing program and also create a market for buildable TDRs. Further work should be done to examine creative options for public and private funding of the BLT program.

## **V. PENDING LEGISLATION**

### **Group Recommendations**

The Group reviewed all legislation pending as of October 31, 2006 and determined that most proposed legislation would be unnecessary if the Group's recommendations are adopted. They did recommend that the Council enact legislation similar to language in Zoning Text Amendment (ZTA) 05-23 that would require that the TDR easement, in addition to limiting the construction of one-family dwellings, prohibit the construction of any non-residential use, other than agriculture, on the affected property as defined in Section 59-A-2. However, they believe that the second part of ZTA 05-23 has unintended consequences that require further discussion and do not recommend the language in that part of the legislation. The second part discusses limiting the use of TDRs on property in the RDT zone that is developed with a non-residential use other than agriculture.

## **Staff Comments**

Staff supports the Group's recommendations.

## **VI. ADDITIONAL ISSUES**

### **Group Recommendations**

The Council's resolution establishing the Ad Hoc Agricultural Working Group called for a comprehensive review while also intentionally limiting the scope of the Group's work to the issues discussed above. The Working Group felt that a broader comprehensive review of policies and laws related to the Agricultural Reserve is necessary and suggest a range of issues that should be considered, including some preliminary thoughts on right-to-farm legislation, education strategies, and design standards.

They recommend the County Council enact legislation that requires potential homebuyers of homes in agricultural zones to be notified of laws that protect farmers from certain nuisance claims. If the number of nuisance complaints increases, they recommend the Council explore whether additional action is necessary. In addition to disclosure, they recommend the County explore options to educate residents about the importance of the Agricultural Reserve.

The Group also recommends the Planning Department explore ways to prevent the fragmentation of agricultural land by locating buildings to preserve viable farmland. They believe that any strategy must maintain owner equity and achieve the goal of preserving farmland. They recommend the Planning Department use the existing agricultural Working Groups to help develop these strategies.

The Group concludes its Report with an expanded list of other issues regarding zoning, tenant homes, rustic roads, and economic viability that they believe should be addressed in any comprehensive consideration of the sustainability and vibrancy of the Montgomery County's Agricultural Reserve.

## **Staff Comments**

Staff support the Group's recommendations and believe the Planning Department should be asked to prepare a work plan for accomplishing these follow-up tasks. Reviewing each of the many issues identified may take several years, but they will not be accomplished at all without a work plan.

## **VII. REVISIONS TO THE MASTER PLAN**

The Planning Board is recommending that the Functional Master Plan for the Preservation of Agriculture and Open Space be updated. The Working Group did not discuss updating the Plan; the Group's strategies to address current problems focused on changing County laws and

regulations. Further assessment will need to be done to determine if implementation of the Group's recommendations either require a Master Plan amendment or would be inconsistent with the Master Plan. If there are inconsistencies, Council staff recommends updating the Master Plan so that there is not a conflict between the Plan and County laws and regulations.

f:\land use\agriculture\council packets\070312cp-2.doc

**NEXT STEPS FOR THE COUNTY COUNCIL IN RESPONSE TO THE AD-HOC AGRICULTURE POLICY WORKING GROUP RECOMMENDATIONS**

<b><u>What Needs to be Done to Implement Working Group Recommendations?</u></b>	<b><u>Planning Board Comment on Report Recommendations</u></b>	<b><u>By Whom?</u></b>	<b><u>Time Frame for Introduction</u></b>
<b>CHANGES TO THE TDR PROGRAM:</b>			
1 Continue implementing a system that tracks the use of TDRs; submit annual TDR reports to the Council. (Annual Report)		M-NCPPC	Short-term
2 Draft amendments to the Zoning Ordinance and Subdivision Regulations to require excess TDR receiving capacity in floating zones research and development, certain commercial, industrial, and mixed use zones (including the commercial portions of mixed-use zones). (ZTA & SRA)	Support	M-NCPPC	Mid-term
3 Create a program by which TDRs on commercial and industrial properties will purchase buildable TDRs instead of excess TDRs. (ZTA) (See staff note regarding TDR deficit)	Support	M-NCPPC	Long-term
4 Eliminate the requirement that receiving areas use 2/3 of the possible TDRs. (ZTA & SRA)	Support	M-NCPPC	Short-term
5 Develop inter-jurisdictional TDR programs with municipalities with appropriate incentives and/or penalties. (MOU)	Support	M-NCPPC & Council	Mid to long-term
6 Maximize the placement of TDR receiving areas during master plan review. (MP)	Support	M-NCPPC & Council	On-going
<b>CHILD LOTS:</b>			
7 Clarify the Zoning Ordinance to indicate that child lots are in addition to market lots. (ZTA)	Planning Board believes that density should not exceed one per 25, even with child lots. (See Board memo for alternative position)	Council	Short-term
8 Clearly restrict child lots to ensure ownership by child (allowing for hardships). Strategies include:		M-NCPPC	Short-term

Short-term: In the next 6 months      ZTA: Zoning Text Amendment      MOU: Memorandum of Understanding  
 Mid-term: By the end of calendar year 2007      SRA: Subdivision Regulation Amendment  
 Long-term: In 2008 or later      MP: Master Plan  
 CC: County Code      Ex. Reg: Executive Regulation

<u>What Needs to be Done to Implement Working Group Recommendations?</u>	<u>Planning Board Comment on Report Recommendations</u>	<u>By Whom?</u>	<u>Time Frame for Introduction</u>
<ul style="list-style-type: none"> <li>Require that the record plat indicate it is a child lot. (SRA)</li> <li>Require that a covenant be recorded in the land records at the time the plat is recorded specifying that the house on the child lot must be owned by the child for five years and must not be leased except to immediate family. (SRA)</li> <li>Require that the building permit be issued in the child's name. (SRA)</li> </ul>	<p>Support</p> <p>Support but does not believe that ownership requirements are enforceable.</p> <p>Support</p>		
9 A majority of any child lot must be preserved in agriculture (important for small lots). (ZTA & SRA)	Support	M-NCPPC	Short-term
10 Codify the long-standing practices that require that each child is only entitled to one child lot, regardless of the number of properties owned by the parent and that the construction of each child lot requires the use of a TDR. (ZTA)	Support	M-NCPPC	Short-term
11 A child lot may be created after the death of the owner if the owners' intent has been established through a will or other document admissible in probate. (ZTA & SRA)	Do not support	M-NCPPC	Short-term
12 Develop a complaint based enforcement mechanism to respond to complaints if a child lot home is prematurely leased. (Ex. Reg)		DPS	Short-term
14 Establish monetary penalties for violation of child lot provisions. (Bill)	Support	Council	Mid-term
15 Amend the language in the Ten-Year Water and Sewerage Plan to allow public water (but not sewer) to child lots under certain limited circumstances: <ul style="list-style-type: none"> <li>When the child lot can be served from an existing water main and service to the property would not provide the</li> </ul>	Planning Board does not believe child lots should receive public water	DEP & Council	Short-term

Short-term: In the next 6 months      ZTA: Zoning Text Amendment      MOU: Memorandum of Understanding  
Mid-term: By the end of calendar year 2007      SRA: Subdivision Regulation Amendment  
Long-term: In 2008 or later      MP: Master Plan  
CC: County Code      Ex. Reg: Executive Regulation

<u>What Needs to be Done to Implement Working Group Recommendations?</u>	<u>Planning Board Comment on Report Recommendations</u>	<u>By Whom?</u>	<u>Time Frame for Introduction</u>
<ul style="list-style-type: none"> <li>opportunity for service to other RDT properties.</li> <li>When public water service can be provided in a manner that would not prevent the future application for a State or County easement for farmland preservation.</li> <li>Require Council approval of any request for public water to a child lot in the RDT zone. (Water &amp; Sewer Plan)</li> </ul>			
16 Develop a monitoring mechanism to track how many child lots use public water. (Water & Sewer Plan)		DEP	Mid-term
<b>SAND MOUNDS:</b>			
17 Obtain written confirmation from the State that limitations on sand mounds do not conflict with State law.	Does not believe pre-emption is an issue	Council Staff	Short-term
18 Enact changes to the Ten-Year Water and Sewerage Plan to reflect the Group's recommendations on sand mound usage limits: One sand mound per 25 acres for the first 75 acres and, beyond that, one sand mound per 50 acres. Allow sand mounds under the circumstances listed below, for a parcel existing as of December 1, 2006. <ul style="list-style-type: none"> <li>Where there is an existing house and the sand mound would not result in the development of an additional house.</li> <li>When it enables a property owner with approved deep trench system peres to better locate potential houses to preserve agriculture.</li> <li>For child lots, provide that recommendations related to child lots are also adopted (e.g., ownership</li> </ul>	<p>Planning Board does not support allowing standing mounds except for exempt properties</p> <p>Support exemptions except where otherwise noted</p> <p>Support to replace deep trench for environmental reasons</p>	DEP	Mid-term

MOU: Memorandum of Understanding

ZTA: Zoning Text Amendment

SRA: Subdivision Regulation Amendment

MP: Master Plan

Ex. Reg: Executive Regulation

Short-term: In the next 6 months

Mid-term: By the end of calendar year 2007

Long-term: In 2008 or later

CC: County Code

<u>What Needs to be Done to Implement Working Group Recommendations?</u>	<u>Planning Board Comment on Report Recommendations</u>	<u>By Whom?</u>	<u>Time Frame for Introduction</u>
<p>requirement). Sand Mounds will be approved for child lots where they are approved under the zoning provisions or approved under the Agricultural Easement Program (MALPF/AEP).</p> <ul style="list-style-type: none"> <li>For bona fide tenant housing, provided that recommendations related to tenant houses are also adopted. Sand Mounds will be approved for bona fide tenant housing wherein the dwelling can never be conveyed from the parent parcel.</li> <li>For any pre-existing parcel that is defined as an exempted lot or parcel in the zoning regulations.</li> <li>For properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions.</li> <li>For any permitted agricultural use under the zoning regulations (e.g., farm market).</li> <li>For the purpose of qualifying for a State or County easement program (including a Building Lot Termination program). (Water &amp; Sewer Plan and Ex. Regs)</li> </ul>	<p>Do not support</p> <p>Support, except for BLT program</p>		
19 Draft guidelines to ensure that properties using sand mounds locate buildings to prevent fragmentation of viable agricultural land. (SRA and/or ZTA)	Support	M-NCPPC	Mid-to long-term
<b>BLT PROGRAM:</b>			
20 Draft Executive Regulations for the BLT Program (note that most of the Group's recommendations relate to for program specifics that will be part of the Executive Regulations) (Ex.	Support BLT program	County Executive	Short-term

Short-term: In the next 6 months      ZTA: Zoning Text Amendment      MOU: Memorandum of Understanding  
Mid-term: By the end of calendar year 2007      SRA: Subdivision Regulation Amendment  
Long-term: In 2008 or later      MP: Master Plan  
CC: County Code      Ex. Reg: Executive Regulation

<u>What Needs to be Done to Implement Working Group Recommendations?</u>	<u>Planning Board Comment on Report Recommendations</u>	<u>By Whom?</u>	<u>Time Frame for Introduction</u>
Reg)			
21 Determine budget implications and funding strategies for FY08 and beyond		County Executive	Short-term
22 <b>RDT LEGISLATION:</b> Clarify that the development of RDT zoned parcels encumbered by TDR easements must be limited to single family houses and agricultural and agricultural related uses only. (ZTA)		Council	Short-term
23 <b>RDT LEGISLATION:</b> Undertake further analysis to determine whether the presence of a PIF on RDT land should limit the number of TDRs available for sale. (Potential ZTA)		M-NCPPC	Long-term
24 <b>RIGHT TO FARM DISCLOSURE LEGISLATION:</b> Enact legislation requiring disclosure for homes being sold in agricultural zones to inform potential homebuyers of current County and State law that protects farmers from certain nuisance claims related to farming. (Bill)		Council	Short-term
25 <b>EDUCATION:</b> Develop an educational strategy for County residents.		County Executive	Mid to long-term
26 <b>WORK PLAN FOR ADDITIONAL ISSUES:</b> Develop a plan for undertaking the additional issues identified at the end of the report.		M-NCPPC	Long-term

F:\land use\agriculture\council packets\next steps for the county council -2.doc

Short-term: In the next 6 months  
 Mid-term: By the end of calendar year 2007  
 Long-term: In 2008 or later  
 CC: County Code

ZTA: Zoning Text Amendment  
 SRA: Subdivision Regulation Amendment  
 MP: Master Plan  
 Ex. Reg: Executive Regulation

MOU: Memorandum of Understanding

5



**NEXT STEPS FOR THE COUNTY COUNCIL IN RESPONSE TO  
THE AD-HOC AGRICULTURE POLICY WORKING GROUP RECOMMENDATIONS**

**SHORT-TERM**

	<b><u>What Needs to be Done to Implement Working Group Recommendations?</u></b>	<b><u>By Whom?</u></b>
1	<b>TDRs:</b> Continue implementing a system that tracks the use of TDRs; submit annual TDR reports to the Council. (Annual Report)	M-NCPPC
4	<b>TDRs:</b> Eliminate the requirement that receiving areas use 2/3 of the possible TDRs. (ZTA & SRA)	M-NCPPC
7	<b>CHILD LOTS:</b> Clarify the Zoning Ordinance to indicate that child lots are in addition to market lots. (ZTA)	Council
8	<b>CHILD LOTS:</b> Clearly restrict child lots to ensure ownership by child (allowing for hardships). Strategies include: <ul style="list-style-type: none"> <li>• Require that the record plat indicate it is a child lot (SRA)</li> <li>• Require that a covenant be recorded in the land records at the time the plat is recorded specifying that the house on the child lot must be owned by the child for five years and must not be leased except to immediate family. (SRA)</li> <li>• Require that the building permit be issued in the child's name. (SRA)</li> </ul>	M-NCPPC
9	<b>CHILD LOTS:</b> A majority of any child lot must be preserved in agriculture (important) for small lots. (ZTA & SRA)	M-NCPPC
10	<b>CHILD LOTS:</b> Codify the long-standing practices that require that each child is only entitled to one child lot, regardless of the number of properties owned by the parent and that the construction of each child lot requires the use of a TDR. (ZTA)	M-NCPPC
11	<b>CHILD LOTS:</b> A child lot may be created after the death of the owner if the owners' intent has been established through a will or other document admissible in probate. (ZTA & SRA)	M-NCPPC
12	<b>CHILD LOTS:</b> Develop a complaint based enforcement mechanism to respond to complaints if a child lot home is prematurely leased. (Ex Reg)	DPS
15	<b>CHILD LOTS:</b> Amend the language in the Ten-Year Water and Sewerage Plan to allow public water (but not	DEP &

Short-term: In the next 6 months  
Mid-term: By the end of calendar year 2007  
Long-term: In 2008 or later  
ZTA: Zoning Text Amendment  
SRA: Subdivision Regulation Amendment  
Ex. Reg: Executive Regulation

	<b>What Needs to be Done to Implement Working Group Recommendations?</b>	<b>By Whom?</b>
	sewer) to child lots under certain limited circumstances: <ul style="list-style-type: none"> <li>When the child lot can be served from an existing water main and service to the property would not provide the opportunity for service to other RDT properties.</li> <li>When public water service can be provided in a manner that would not prevent the future application for a State or County easement for farmland preservation.</li> </ul> Require Council approval of any request for public water to a child lot in the RDT zone. (Water & Sewer Plan)	Council
17	<b>SAND MOUNDS:</b> Obtain written confirmation from the State that limitations on sand mounds do not conflict with State law.	Council Staff
	<b>BLT PROGRAM:</b>	
20	Draft Executive Regulations for the BLT Program (note that most of the Group's recommendations relate to for program specifics that will be part of the Executive Regulations) (Ex. Reg)	County Executive
21	Determine budget implications and funding strategies for FY08 and beyond.	County Executive
22	<b>RDT LEGISLATION:</b> Clarify that the development of RDT zoned parcels encumbered by TDR easements must be limited to single family houses and agricultural and agricultural related uses only. (ZTA)	Council
24	<b>RIGHT TO FARM DISCLOSURE LEGISLATION:</b> Enact legislation requiring disclosure for homes being sold in agricultural zones to inform potential homebuyers of current County and State law that protects farmers from certain nuisance claims related to farming. (Bill)	Council

## MID-TERM

2	<b>TDRs:</b> Draft amendments to the Zoning Ordinance and Subdivision Regulations to require excess TDR receiving capacity in floating zones research and development, certain commercial, industrial, and mixed use zones (including the commercial portions of mixed-use zones). (ZTA & SRA)	M-NCPPC
5	<b>TDRs:</b> Develop inter-jurisdictional TDR programs with municipalities with appropriate incentives and/or penalties. (MOU)	M-NCPPC & Council
14	<b>CHILD LOTS:</b> Establish monetary penalties for violation of child lot provisions. (Bill)	Council

Short-term: In the next 6 months  
Mid-term: By the end of calendar year 2007  
Long-term: In 2008 or later  
ZTA: Zoning Text Amendment  
SRA: Subdivision Regulation Amendment  
Ex. Reg: Executive Regulation

	<b>What Needs to be Done to Implement Working Group Recommendations</b>	<b>By Whom?</b>
16	<b>CHILD LOTS:</b> Develop a monitoring mechanism to track how many child lots use public water. (Water & Sewer Plan)	DEP
18	<p><b>SAND MOUNDS:</b> Enact changes to the Ten-Year Water and Sewerage Plan to reflect the Group's recommendations on sand mound usage limits:            One sand mound per 25 acres for the first 75 acres and, beyond that, one sand mound per 50 acres.            Allow sand mounds under the circumstances listed below, for a parcel existing as of December 1, 2006.</p> <ul style="list-style-type: none"> <li>• Where there is an existing house and the sand mound would not result in the development of an additional house.</li> <li>• When it enables a property owner with approved deep trench system percs to better locate potential houses to preserve agriculture.</li> <li>• For child lots, provide that recommendations related to child lots are also adopted (e.g., ownership requirement). Sand Mounds will be approved for child lots where they are approved under the zoning provisions or approved under the Agricultural Easement Program (MALPF/AEP).</li> <li>• For bona fide tenant housing, provided that recommendations related to tenant houses are also adopted. Sand Mounds will be approved for bona fide tenant housing wherein the dwelling can never be conveyed from the parent parcel.</li> <li>• For any pre-existing parcel that is defined as an exempted lot or parcel in the zoning regulations.</li> <li>• For properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions.</li> <li>• For any permitted agricultural use under the zoning regulations (e.g., farm market).</li> <li>• For the purpose of qualifying for a State or County easement program (including a Building Lot Termination program). (Water &amp; Sewer Plan and Ex. Regs)</li> </ul>	DEP

Short-term: In the next 6 months  
 Mid-term: By the end of calendar year 2007  
 Long-term: In 2008 or later  
 ZTA: Zoning Text Amendment  
 SRA: Subdivision Regulation Amendment  
 Ex. Reg: Executive Regulation

## MID TO LONG TERM

19	<b>SAND MOUNDS:</b> Draft guidelines to ensure that properties using sand mounds locate buildings to prevent fragmentation of viable agricultural land. (SRA and/or ZTA)	M-NCPPC
25	<b>EDUCATION:</b> Develop an educational strategy for County residents.	County Executive

## LONG-TERM

3	<b>TDRs:</b> Create a program by which TDRs on commercial and industrial properties will purchase buildable TDRs instead of excess TDRs. (ZTA) (See staff note regarding TDR deficit)	M-NCPPC
23	<b>RDT LEGISLATION:</b> Undertake further analysis to determine whether the presence of a PIF on RDT land should limit the number of TDRs available for sale. (Potential ZTA)	M-NCPPC
26	<b>WORK PLAN FOR ADDITIONAL ISSUES:</b> Develop a plan for undertaking the additional issues identified at the end of the report.	M-NCPPC

## ON-GOING

6	<b>TDRs:</b> Maximize the placement of TDR receiving areas during master plan review. (MP)	M-NCPPC & Council
---	--	-------------------

Short-term: In the next 6 months  
 Mid-term: By the end of calendar year 2007  
 Long-term: In 2008 or later  
 ZTA: Zoning Text Amendment  
 SRA: Subdivision Regulation Amendment  
 Ex. Reg: Executive Regulation

# **INTRODUCTION AND SUMMARY OF RECOMMENDATIONS**

## **I. INTRODUCTION**

In 1981 the County Council established Montgomery County's Agricultural Reserve to preserve farming, provide open space, and protect the environment. The County's Functional Master Plan for the Preservation of Agriculture and Rural Open Space limited residential development in nearly one-third of the County in order to achieve these goals. The Agricultural Reserve was visionary and bold at that time, and we believe that the Council's goals behind establishing the Agricultural Reserve remain entirely valid today. The Agricultural Reserve is regularly cited throughout the United States as the country's leading model for agricultural, open space, and environmental preservation.

Over the ensuing quarter century, Montgomery County has changed enormously, in population size and diversity, economic activity, and land use. The Agriculture Reserve, meanwhile, has succeeded in preserving agriculture in the County. The mix of agriculture, to be sure, has evolved. For example, dairy farming has dwindled while specialty farms have increased in number and value. This evolution has only confirmed that agriculture can be preserved as an integral part of a modern, vibrant, and diverse metropolitan region. Over this same period, public awareness of environmental issues and threats to natural resources has grown exponentially, so that today the Agricultural Reserve is widely viewed as an environmental oasis in a sprawling metropolitan area. Citizens not only recognize the intrinsic value of agriculture, but the extraordinary benefit of preserving open countryside for every citizen to enjoy and experience, and of an environmental asset that helps preserve the healthfulness of our water supply and of the air we breathe. There seems to be a broad consensus throughout Montgomery County that the Agricultural Reserve is worth preserving and sustaining.

At the same time, the Agricultural Reserve is under stress. Especially since the turn of the century, pressure for residential development in the Reserve has increased. This is not surprising, given the amount of open acreage it encompasses and its uniqueness in the metropolitan area. The viability of the Agricultural Reserve, and perhaps its very survival, is threatened by extreme development pressures, proposals for new interstate highways, and increasing land values in the greater Washington metropolitan area. While public support appears to remain favorable, there are concerns that many citizens of the County, especially those who live in more distant urban areas, are not fully aware of the importance of the Agricultural Reserve to the life and character of Montgomery County. These mounting stresses are reflected in the increasing number, complexity, and emotional intensity of debates before the Council and Planning Board regarding appropriate public policies for agricultural preservation. For example, sanitation policy (including whether and when to permit sand mounds in lieu of traditional trench sanitation systems), the viability of the Transferable Development Rights (TDR) program, and the ambiguity of the child lot zoning exception, have all recently come before the Planning Board or Council.

In response to these trends, the County Council appointed the Ad Hoc Agricultural Policy Working Group in April 2006 to "provide comprehensive advice on ways to ensure the long-term protection of the Agricultural Reserve and preservation of our agricultural industry." In particular, the Council charged the Group with addressing a cluster of specific and inter-related issues by performing the following tasks:

- Undertake a thorough review of pending and potential legislation concerning the Rural Density Transfer (RDT) zone, the child lot program, the proposed Building Lot Termination program (BLT), uses of sand mound technology, and technical tracking and use issues associated with the TDR program;
- Assure that this review provides a clear understanding of how the individual proposals interact with each other and considers the potential for unanticipated negative consequences;
- Proceed in a way that respects the concerns of all stakeholders; and
- Update the Council on its progress and submit a final report to the Council within calendar year 2006.

The 15 members of the Group represent very different backgrounds and philosophies about the Agricultural Reserve and property rights. We are farmers, property owners, representatives of organizations, former elected officials, and citizens. Even with these differences, however, we share both a belief that the Agricultural Reserve is valuable to all the County's citizens and a common interest in preserving agriculture in Montgomery County. This positive approach created a productive and conciliatory environment in which we sought consensus on creative and practical solutions to difficult problems. Part of the process of finding common ground led us to identify principles on which all members could agree, and which provided the underlying rationale for our recommendations.<sup>1</sup> These principles include the following:

## GENERAL PRINCIPLES

1. The economic viability of the agricultural industry is critical to the preservation of the Agricultural Reserve.
2. The open space and environmental protection goals of the Master Plan are unlikely to be achieved unless we can sustain the health of agriculture.
3. Agriculture in the County has and will continue to evolve and requires an environment that recognizes that fact.
4. The equity farmers hold in their property is not only important to them personally but an important asset for their businesses, and consequently an important factor in the success of the agricultural industry in the County.
5. Fragmentation of farmland should be avoided. Contiguous areas of farmland are desirable for traditional agriculture.
6. If the Agricultural Reserve is to survive permanently, policies must protect both farming and farmland, while fostering a deep commitment to stewardship that looks beyond current generations and current landowners.

---

<sup>1</sup> See Comment 3 by Wade Butler, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, and Jane Evans in Appendix II.



We applied these principles in developing our recommendations in a consistent manner. For example, in order to protect the equity and business viability of farmers, we concluded that any new program or policy to discourage development must be evaluated in terms of its impact on farmers' financial viability. This would mean that programs that provide equity in lieu of development (such as building lot terminations or transferring development rights in exchange for payment) are an important means of preserving this equity. To successfully implement such programs, the County government should identify options for funding them either through the public sector (e.g., farmland preservation tax, general obligation bonds) and/or through the private sector (e.g., through an enhanced TDR program).

While we focused on the specific cluster of tasks given us by the Council, we also examined a few additional issues, including whether there is a need for right-to-farm legislation, design guidelines, or educational programs. We took seriously the charge to look comprehensively at issues. We made every effort to understand the inter-relationship of issues raised by pending legislation and proposals. We also attempted to identify the full range of issues related to the Agricultural Reserve, both to understand comprehensively the specific and interrelated tasks the Council assigned us, and to build a checklist of issues that other entities will need to address if the Agricultural Reserve is to survive and flourish.

The Group worked hard to achieve consensus, which was possible on most issues we addressed. Our recommendations do not always reflect an ideal solution from any one member's perspective, but in all but one case offer proposals that are generally acceptable to the entire Group. Our intent was not to paper over important differences, but rather to acknowledge them and attempt to find a consensus position that respected each individual position while best addressing the goals of the Agricultural Reserve. For example, the issue of clarifying the acceptable uses of sand mounds proved to be especially challenging, as it brings into sharp relief the debate between different perspectives which are difficult to reconcile. Some Group members believe that sand mounds offer an alternative method of private sewage treatment that was not envisioned by the County Council when it created the Agricultural Reserve. Other Group members believe that sand mounds are an entirely legitimate form of sanitation technology whose use should not be restricted. Still others believe that the Master Plan intends to limit the use of alternative individual systems, such as sand mounds, to special circumstances and that sand mounds should not be allowed to increase residential development in the Agricultural Reserve. Our intent for each issue was to clearly define the factual background, the policy options, and the differences in perspective, as well as the position taken by the Group. Dissenting opinions and comments are indicated by footnotes in the text and are included at the end of the Report in Appendix II. Comments by Group members referencing specific recommendations or statements in the Report are indicated by footnotes in the relevant chapter while general comments are indicated by footnotes in this Introduction.

Notwithstanding our clear and acknowledged differences, we all strongly support the continued protection of the Agricultural Reserve and the future of farming in the County. Collectively, we believe the Group's recommendations will better protect the Agricultural Reserve, while not asking any single party – whether property owners in the Reserve or other County residents and taxpayers – to unduly bear the cost of this protection.

## KEY THEMES

If implemented, we believe our recommendations will accomplish the following:

- Allow the continued use of child lots intended for the children of farmers (but with stricter assurance that those lots will be owned by the children of the property owner, and will not prevent future use of a significant portion of the property for farming);
- Limit the use of sand mounds, decreasing their potential use by as much as one-fourth;
- Create a BLT easement program to create an incentive to further reduce residential development in the Agricultural Reserve while providing an acceptable level of equity to property owners, giving them the resources that may be needed for farm investment; and
- Improve the TDR program, including expanding it to commercial and industrial zones (including Research and Development zones), mixed-use zones, and floating zones, and creating a non-residential use component to, among other things, help support the BLT easement program.

The Council asked for our advice on the interaction among the specific cluster of issues they asked us to address. We believe our recommendations on these issues form an integral package that needs to be viewed, and should be implemented, in its entirety. The recommendations attempt to strike a balance by reducing the total amount of development possible in the Agricultural Reserve, while at the same time creating new opportunities to compensate landowners for further limitations on development. For example, we strongly believe that funding of the BLT easement program, which would compensate property owners as an incentive to enhance agricultural preservation and prevent development, is critical as an offset to the restrictions we recommend for sand mounds. The BLT easement program, moreover, could significantly reduce the use of sand mounds.

We caution, however, that this important but limited cluster of issues also needs to be placed in an even broader context that accounts for still other critical issues that affect the viability of the Agricultural Reserve. We addressed some of these issues, and identified a range of others that we did not have time to address. However, we urge the Council, Executive, and Planning Board to carefully consider this broader range of issues, even as they act on the more narrow cluster of issues on which we focused. We especially urge an expanded education initiative for all County residents on the importance of the Agricultural Reserve to Montgomery County and the Washington Region in order that we not lose the critical public support throughout the County that provided the foundation for the Council to establish the Agricultural Reserve and to sustain it over the past 25 years.

## THE NEED FOR ACTION

We met biweekly between May and December 2006, including a tour of the Agricultural Reserve, in order to meet the Council's deadline to finish our work by the end of 2006.<sup>2</sup> Group members also met in smaller groups throughout the process in order to better understand one

---

<sup>2</sup> See Comment 7 by Pam Saul in Appendix II.



another's perspectives and develop new ideas and consensus. We trust that we have fulfilled the charges given us by the Council in the time allotted, even if we were not able to address every detail. We have identified important follow-up issues that will require further review and work, and urge the Council and Planning Board to give these matters your priority attention. In the course of our work, we came upon numerous recommendations from prior working groups that have not been addressed, and urge the County government to address the full range of issues that, taken together, will determine the future of the Agricultural Reserve.<sup>3</sup>

In particular, we urge the County Council to take decisive and rapid action in two key areas. First, provide incentives to current landowners to keep their land in agriculture, indirectly enabling new entrants to farming in Montgomery County. Second, provide additional disincentives to an increasing pace of residential development within the Agricultural Reserve. We need to protect the farming and the farmland we have, we need to encourage entry of more farmers and a new generation of farmers, and we need to limit or even reduce the pace of residential buildout in the Reserve. We believe our package of proposals can dramatically advance all these goals.

Montgomery County can take pride in the establishment and the success to date of its Agricultural Reserve, an unparalleled resource that benefits all the County's residents, and indeed the Washington metropolitan area as a whole. But we cannot take its future survival for granted. A tipping point approaches with the convergence of too much farmland given over to new housing and mini-subdivisions, too much fragmentation of farmland, and too many barriers to farming. We have no simple formula for determining when that tipping point is reached, and indeed encourage more deliberate attention to that very question. It is our strong sense that unless the County government acts soon and decisively, that tipping point could soon be upon us. Now is the time for a new commitment to the stewardship of our Agricultural Reserve so that it will endure for the remainder of this century and beyond, not just for our own children and grandchildren, but for theirs as well.

Following is a **summary of our principal recommendations.**

## **II. SUMMARY OF PRINCIPAL RECOMMENDATIONS**

### **A. TRANSFERABLE DEVELOPMENT RIGHTS**

When the County Council established the base density in the Rural Density Transfer (RDT) zone – the prevailing zone in the Agricultural Reserve – at one dwelling unit for 25 acres, it also created Transferable Development Rights (TDRs) that granted property owners one development right, or one “TDR,” for each five acres of land owned. Landowners in the RDT zoned “sending areas” could then sell a TDR to landowners or developers in a “receiving area” in order to increase their development density. (A receiving area is a parcel designated as appropriate for development beyond its base density when the property owner purchases TDRs.) This

---

<sup>3</sup> A summary of the 2002 TDR Task Force recommendations is in Appendix III.

pioneering technique has generally been successful to date, but will require significant attention and adjustments if it is to fulfill its important role in the Agricultural Reserve.<sup>4</sup>

We recommend the County Council enact the following changes to the current TDR program:

- Distinguish between excess and buildable TDRs.
- Require TDR utilization for residential development in floating zone applications/local map amendments.
- Designate buildable TDRs for use in floating zones as well as in commercial and industrial zones, central business district and research and development zones with an equivalency to floor area ratio or square footage for their use.
- Clarify limitations on non-agricultural, non-residential uses (such as private institutional facilities) where land is covered by a TDR easement.
- Reintroduce legislation to prevent property owners from selling all TDR easements and subsequently developing a non-residential, non-agricultural use on the property.

We endorse the following recommendations of the 2002 TDR Task Force:

- Master plans should more aggressively seek to maximize the number of receiving areas.
- If additional density is considered via rezoning not recommended in the Master Plan, the use of TDRs should be part of the change.
- The County should work with local municipalities to establish inter-jurisdictional TDRs to create receiving areas in municipalities.
- Eliminate the requirement in single-family zones and subdivision regulations that receiving areas use 2/3 of the possible TDRs.

We have received briefings from the County Planning Department on the status of a system to track the use of TDRs and are satisfied that improved TDR tracking is under way and that the planned TDR tracking system should meet future TDR information needs.

## **B. CHILD LOTS**

To encourage family continuity in farming, the RDT zone made allowance for landowners to build houses for their adult children at densities beyond one dwelling unit per 25 acres. This "child lot" program has been subject to differences in interpretation and to charges of abuse, and therefore requires both clarification and strict standards of implementation.

We recommend continuing to allow child lots in the RDT zone. We believe that the child lot provision is an important means to preserve and promote agriculture by allowing children to farm with their parents on the family farm. We recommend the County Council amend the

---

<sup>4</sup> See Comment 3 by Wade Butler, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, and Jane Evans, paragraphs 7 and 8 in Appendix II.

Zoning Ordinance to clarify the density provisions for child lots, ensure ownership by the child, and protect farmland.

We recommend the maximum density of subdivisions with child lots be one lot per child *in addition* to the base density allowed in the RDT zone.<sup>5</sup> For example, a property owner with 100 acres and two children will be allowed six lots (two child lots and four base density lots). This has been the practice of the Planning Board since the RDT zone was established. To limit the use of child lots for improper purposes, we recommend the following limitations on child lots:

- A child must own the child lot dwelling for five years; however exceptions should be allowed for hardship cases such as those used in the Maryland Agricultural Land Preservation Foundation (MALPF) easement program.
- A child must not lease the child lot dwelling or enter into a contract for sale for five years, except the child may lease the child lot home to an immediate family member.
- A landowner may create only one child lot for each child regardless of the number of properties owned.
- A child lot may be created after the death of the landowner if the landowner's intent was to create the lot and is established in writing through a will or other document admissible in probate.
- A majority of the land on parcels with child lots must be reserved for agriculture.

To facilitate the implementation of the ownership requirement and leasing prohibition, we recommend additional written documentation and recordation at different steps in the planning process. We also recommend substantial monetary penalties for violation of child lot requirements.

We recommend limiting circumstances in which public water can be provided to child lots to the following:

- When the child lot can be served from an existing, abutting water main and will not allow service to others.
- When public water service can be provided in a manner that would not prevent the future application for a State or County easement to preserve agriculture.

We recommend the County Council be required to approve any request for public water to a child lot in the RDT zone rather than allowing administrative approval.

### **C. SAND MOUNDS**

Agriculture is the preferred use for the Agricultural Reserve proposed by the Functional Plan for the Preservation of Agriculture and Rural Open Space, and this is clearly stated in the Zoning Ordinance. One of the key recommendations of the Master Plan was to "support a rural sanitation policy that does not encourage development within the critical mass of active

---

<sup>5</sup> See Comment 1 by Margaret Chasson, Nancy Dacek, Bob Goldberg, and Tom Hoffmann and endorsed by Jim O'Connell and Comment 6 by Scott Fosler, paragraph C in Appendix II.

farmland.”<sup>6</sup> To accomplish its goal of preserving land for farming, the Master Plan recommended against the use of alternative individual and community sewerage systems in the Reserve.<sup>7</sup> There was debate about whether sand mounds were an alternative system. As we seek to accomplish the aims of the Master Plan we recognize that in some cases the use of sand mound technology may be appropriate. Therefore, we recommend the County continue to permit sand mounds, but limit their potential use.

We debated whether a quantitative, acreage-based limitation on sand mounds was the best solution available that might gain widespread support. The sand mound issue was the most controversial topic we discussed, as reflected by the extensive comments Group members submitted both in support and in opposition to the majority recommendation.<sup>8</sup> A majority of the Working Group supports a quantitative, acreage-based limitation on sand mounds (described below) that might reduce overall application of sand mounds by an estimated 25% over what would otherwise occur. A minority of the Working Group is not convinced of this approach, and would recommend limiting the use of sand mounds more aggressively or on some other basis. However, we all agree that there are a number of “special cases” where use of sand mounds is justified, as discussed below. One reason for this minority view is a deeply held concern that the impact of the majority’s proposal is not well enough understood to be reliably predicted. We spent substantial time trying to achieve an acreage-based compromise that would satisfy all members, but in the end, concluded it would be appropriate to explain this difference of views in this Report.

Our recommendation recognizes the competing interests between retaining value in farmland for the purpose of sustaining farmers and retaining large tracts of land where agriculture can dominate activity. We recommend sand mounds be allowed as follows: One sand mound per 25 acres for the first 75 acres. Beyond that, one sand mound should be allowed for every 50 acres of land in the parcel. For example, a property owner with 125 acres but less than 175 acres would be allowed four sand mounds; one with 175 acres but less than 225 acres would be allowed five sand mounds, etc.

In addition, we recommend sand mounds be allowed under the circumstances listed below, for a parcel existing as of December 1, 2006.

- Where there is an existing house and the sand mound would not result in the development of an additional house.
- When it enables a property owner with approved deep trench system percs to better locate potential houses to preserve agriculture.
- For child lots, provided that our recommendations related to child lots are also adopted (e.g., ownership requirement). Sand Mounds will be approved for child lots

---

<sup>6</sup> Maryland-National Capital Park and Planning Commission, “Approved and Adopted Functional Master Plan Preservation of Agriculture and Rural Open Space”, page iv (October, 1980).

<sup>7</sup> *Id.*, at 62.

<sup>8</sup> See Comment 2 by Margaret Chasson, Nancy Dacek, Scott Fosler, Bob Goldberg, Tom Hoffmann, and Jim O’Connell; Comment 3 by Wade Butler, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, and Jane Evans; Comment 5 by Jim Clifford; Comment 7 by Pam Saul; and Comment 8 by Elizabeth Tolbert in Appendix II.

where they are approved under the zoning provision or approved under the Agricultural Easement Program MALPF/AEP.

- For bona fide tenant housing, provided that recommendations related to tenant houses are also adopted. Sand Mounds will be approved for bona fide tenant housing wherein the dwelling can never be conveyed from the parent parcel.
- For any pre-existing parcel that is defined as an exempted lot or parcel in the zoning regulations.
- For properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions (specific criteria for these grandfathering provisions are addressed below).
- For any permitted agricultural use under the zoning regulations (e.g., farm market).
- For the purpose of qualifying for a State or County easement program (including a Building Lot Termination program).

#### **D. BUILDING LOT TERMINATION (BLT) EASEMENT PROGRAM**

Even when landowners in the RDT zone sell TDRs, they typically retain one TDR for each 25 acres owned so that they will have a buildable lot. (This is why we refer to that single TDR retained for each 25 acres as a “buildable TDR,” and the other four TDRs for each 25 acres as “excess TDRs,” since the landowner cannot use these to build on RDT zoned property in “sending areas,” but can only sell them to be used in “receiving areas.”) The consequence is a higher probability than originally envisioned that the Agricultural Reserve will be “built out” at close to the full density of one dwelling unit per 25 acres, a result that could jeopardize agriculture, principally by fragmenting farmland. We believe that addressing this problem is central to the viability of the Agricultural Reserve.<sup>9</sup>

We recommend establishing a BLT easement program as a way to prevent fragmentation of farmland in the Agricultural Reserve. A BLT program is designed to compensate a landowner financially in exchange for an easement that eliminates future development of a lot shown to be viable for building through a soil percolation test.

There are two goals and purposes of a BLT program: (1) reduce the number of buildable lots in the Agricultural Reserve while providing equity to landowners; and (2) preserve by easement as much usable farmland as possible.

We recommend strict eligibility criteria for participation in the BLT program to ensure that a bona fide development lot is terminated and appropriate public benefit is derived.

As a basis for compensation, we recommend a landowner prove that the lot can support a house with a viable septic system before participating in the BLT program. Regarding funding, we recommend public funding of the BLT program initially using proceeds from the Agricultural Transfer Tax with compensation set at a percentage of the fair market value of a buildable lot in the RDT zone. Although some Group members have some reservations with publicly funding

---

<sup>9</sup> See Comment 6 by Scott Fosler, paragraph D, in Appendix II.

the BLT program, we recognize that public funding is the only way to get the BLT program started quickly. At the same time, we recommend the County create a buildable TDR program to provide private funding via the purchase of TDRs by developers of non-residential property.

#### **E. PENDING LEGISLATION**

Several pieces of legislation pending as of October 31, 2006 would affect the Agricultural Reserve and need to be reconciled with the Group's findings and recommendations.

We recommend the Council enact legislation similar to language in Zoning Text Amendment (ZTA) 05-23 that would require that the TDR easement, in addition to limiting the construction of one-family dwellings, prohibit the construction of any non-residential use, other than agriculture, on the affected property as defined in Section 59-A-2. However, the second part of ZTA 05-23 has unintended consequences that require further discussion and we are not recommending the current language in that part of this legislation. The second part discusses limiting the use of TDRs on property in the RDT zone that is developed with a non-residential use other than agriculture.

#### **F. ADDITIONAL ISSUES**

The Council's resolution establishing the Ad Hoc Agricultural Working Group called for a comprehensive review while also intentionally limiting the scope of the Group's work to the issues discussed above. We feel that a broader comprehensive review of policies and laws related to the Agricultural Reserve is necessary and suggest a range of issues that should be considered, including some preliminary thoughts on right-to-farm legislation, education strategies, and design standards.

We recommend the County Council enact legislation that requires potential homebuyers of homes in agricultural zones to be notified of laws that protect farmers from certain nuisance claims. If the number of nuisance complaints increases, we would recommend the Council explore whether additional action is necessary. In addition to disclosure, we recommend the County explore options to educate residents about the importance of the Agricultural Reserve.

We also recommend the Planning Department explore ways to prevent the fragmentation of agricultural land by locating buildings to preserve viable farmland. Any strategy must maintain owner equity and achieve the goal of preserving farmland. We understand that there is tension between the Planning Department and property owners on the issue of design standards and efforts to identify solutions must be mindful of these tensions. We recommend the Planning Department use the existing agricultural advisory groups to help develop these strategies.

We conclude this Report with an expanded list of other issues regarding zoning, tenant homes, rustic roads, and economic viability that we believe should be addressed in any comprehensive consideration of the sustainability and vibrancy of the Montgomery County's Agricultural Reserve.